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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WAGNER D. JACKSON, JR.,

PETITIONER,

v.

U.S. ATTORNEY'S OFFICE,
DISTRICT OF NEW JERSEY, et al.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May an agency from which a particular document has been requested under 5 U.S.C. §552 (The Freedom of Information Act) refuse to contact both the identified author of the document and one identified person who received the document, and also refuse to get sworn statements from said identified individuals as to the whereabouts of the document, relying instead upon a search of general office files by an individual unrelated to the document who claims to have been unable to find it?

PARTIES TO THE PROCEEDING

Petitioner is Wagner D. Jackson, Jr., *pro se.*

Respondents are the United States Attorney's Office for the District of New Jersey, Christopher J. Christie, United States Attorney for New Jersey, the United States Department of Justice Executive Office of United States Attorneys and Office of Information and Privacy, Michael B. Mukasey, Attorney General, the United States Attorney's Office for the District of Columbia, and Jeffrey A. Taylor, United States Attorney for the District of Columbia.

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Wagner D. Jackson, Jr., petitioner *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals and the district court are attached, in chronological order, as follows: (1) Appendix A — Order Of The United States Court Of Appeals For The District Of Columbia Circuit, 20 November 2007; (2) Appendix B — Mandate Of The United States Court Of Appeals For The District Of Columbia Circuit, 30 November 2007; (3) Appendix C — Order Of The United States Court Of Appeals For The District Of Columbia Circuit, 8 August 2007; (4) Appendix D — Order Of The United States Court Of Appeals For The District Of Columbia Circuit, 5 June 2007; (5) Appendix E — Order Of The United States District Court For The District Of Columbia, 4 January 2007; (6) Appendix F — Order Of The United States Court Of Appeals For The District Of Columbia Circuit, 26 August 2005; (7) Appendix G — Order Of The United States District Court For The District Of Columbia, 23 February 2005; (8) Appendix H — Order Of The United States District Court For The District Of Columbia, 30 August 2003. Appendix ("App."), *infra*, 1a-34a.

JURISDICTION

The original judgment of the court of appeals was entered on 5 June 2007. App., 7a-8a. The

second judgment was entered on 8 August 2007. App., 5a-6a. A petition for rehearing en banc was denied on 20 November 2007. App., 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY LAW

THE FREEDOM OF INFORMATION ACT (FOIA)[1]
5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

.....

(4)(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall

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[1]The full text appears in the Appendix at pages 35a-60a.

submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(4)(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

STATEMENT OF THE CASE

This action for enforcement of the Freedom of Information Act (FOIA) is brought under 5 U.S.C. §552 *et seq.*

On 10 May 1999, Petitioner sent a FOIA request to Respondent United States Attorney's Office of New Jersey (USAO/NJ) to get a copy of a written directive prepared by the then chief of its Criminal Division, Ms. Patricia Shwartz. Petitioner was informed of the directive that day by Special Agent Brad Orsini of the Newark, New Jersey office of the FBI. The directive ended an FBI investigation of perjury by a New Jersey business owner whom Petitioner sued in the United States District Court for the District of New Jersey for illegal racial discrimination in the operation of said business. Petitioner asked Special Agent Orsini for a copy of the directive and he refused. He also refused to inform Appellant of its contents over the telephone. Mr. Orsini instead advised Petitioner to try to get

the directive from USAO/NJ, specifically, Ms. Shwartz. On 17 May 1999, Ms. Shwartz refused to produce the document and gave ridiculous and conflicting explanations for ending the investigation. Administrative responsibility for the matter was then transferred from Respondent USAO/NJ to Respondent United States Department of Justice Executive Office for United States Attorneys (EOUSA) in Washington, D.C. Respondent EOUSA also refused to produce the document.[2]

In June 2000, Petitioner brought this suit under FOIA to get the Shwartz directive. EOUSA personnel filed affidavits saying that they traveled from Washington, D.C. to Newark to search the USAO/NJ files for the Shwartz directive but did not locate it. Petitioner argued below that any search reasonably calculated to uncover all relevant documents in this case obviously required ordering Ms. Shwartz, now United States Magistrate Judge

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[2]These distortions of the federal legal system in New Jersey may be attributable to the fact that one of the two co-owners of the New Jersey business which Petitioner sued for illegal racial discrimination was Paula S. Krongard of the politically well-connected Krongard family of New Jersey. Her husband, Howard J. Krongard, is presently the State Department Inspector General, and he is now under investigation by the United States Senate for "repeatedly thwart[ing] investigations into contracting fraud in Iraq and Afghanistan, including construction of the U.S. Embassy in Baghdad, and censor[ing] reports that might prove politically embarrassing to the Bush Administration ... [Howard] Krongard's brother, A.D. "Buzzy" Krongard, served as the No. 3 CIA official under then-Director George J. Tenet" Glenn Kessler and Karen DeYoung, *"Inspecting The Inspector: State IG Accused Of Averting Probes,"* Wash. Post, 19 September 2007 at A21.

Shwartz, and Special Agent Orsini, to either produce the Shwartz directive or produce affidavits explaining why no copies now exist. In February 2005, United States District Court Judge Richard J. Leon issued a final order on crossing motions for summary judgment demanding that Shwartz and Orsini produce the Shwartz directive or produce affidavits swearing that no copies now exist and explaining why this is so. App. at 15a-20a. The last part of the order reads:

> ORDERED that the defendants contact and discuss the written directive with Ms. Shwartz and Special Agent Orsini. The USAO/NJ has 90 days to either produce the written directive or to produce written affidavits from Ms. Shwartz and Special Agent Orsini regarding the prior existence, and present whereabouts, of the written directive.

App. at 20a. Note that this final order does not call for any more file searches. Shwartz and Orsini were to either produce the Shwartz directive or the described affidavits in 90 days.

Respondents responded by first filing an appeal (No. 05-5149) to the circuit court. In May 2005, however, Respondents filed a "response statement" in the district court in which they restated their legal arguments made when the

parties cross-filed motions for summary judgment.[3] It is difficult to understand why this document was filed. A district court's final order invites only (1) a motion for reconsideration, to be filed within 10 days under Fed. R. Civ. P. 58, (2) an appeal, or (3) compliance with the order. This "response" is none of the above. Since it was filed about 90 days after the final order, its timing suggests compliance. But it was anything but compliance. It was a statement of Respondents' refusal to obey the district court.

In June 2005, Respondents filed a motion, with absolutely no supporting citations, asking that their appeal, already being processed by the panel, be put "on hold." Petitioner opposed this bizarre motion with controlling legal authority,[4] but the

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[3]Respondents' also added another declaration regarding another failed file search from an EOUSA employee named Lisa H. Jones. District Court Docket No. 43 at 2, 4-5.

[4]The filing of a notice of appeal ends the district court's control over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam); see *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). It is axiomatic that "a federal district court and a court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs*, 459 U.S. at 58; see *Marrese*, 470 U.S. at 379. "The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* The district court retains only jurisdiction over tangential matters such as determining the propriety and amount of attorney's fees, and performing "certain ministerial functions in aid of the appeal, such as correcting clerical mistakes in the record,

circuit court panel granted it in August 2005 in a two sentence order which also contained absolutely no citations to any authority of any kind. App. at 13a-14a. This meant that Respondents' refusal to obey the district court's final order was now detached from any possible expectation of having the order overruled on appeal, since there was no active appeal underway.

From August 2005 until January 2007, there was no essentially no activity in the case. The district court had ordered the production of documents, Respondents announced their refusal to obey the order, and the circuit court panel agreed to illegally pretend that it had not already taken jurisdiction over the case on appeal. The case was now back in the district court, there was no active appeal underway, and Respondents had informed the district court that they would neither appeal nor obey his order. The district court judge then made his order moot.

On 4 January 2007, the district court dismissed Petitoner's case on the finding that Petitioner had refused to respond to a 16 December 2006 "Fox Order" requiring a response to Respondents' May 2005 "response statement by 30 December 2006. App. at 9a-12a. In fact, Petitioner

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approving appeal bonds, and issuing stays or injunctions pending the appeal." C. Wright, A. Miller, E. Cooper & E. Gressman, 16 Federal Practice and Procedure, §3949 at 359 (1977). Any substantive action by the district court is null and void. J. Moore & B. Ward, 9 Moore's Federal Practice, ¶ 203.11 at 3-45, 3-46 (2d ed. 1990).

received no such Fox Order, presumably because the district court never mailed it to the Petitioner. Obviously, Petitioner could not respond to an order kept secret from him due to the district court's failure to send Petitioner the order.[5]

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[5]Moreover, since Respondents' May 2005 response in no way met the demands of the district court's February 2005 order --- and was, in fact, simply Respondents' statement of refusal to obey the order --- it is difficult to understand how any response from Petitioner could possibly have been useful. Respondents' refusal to obey with the law was obvious, so an additional statement from Petitioner in December 2006 would have served no purpose.

Furthermore, the demand for an additional statement from Petitioner was irrational because Petitioner *had already responded* in Petitioner's Reply To Respondents' Opposition To Motion To Strike (filed 20 June 2005). District Court Docket No. 46 at 2, n.1. Following up on the plain language of the district court's February 2005 final order and the presentation of legal authorities already made in the earlier summary judgment briefing, Petitioner's response was:

> [Respondents] have plainly not complied with the order or with the requirements of FOIA by simply asserting that the document in question does not exist without sworn statements from the two people known to have produced and/or handled the document. Indeed, one has to wonder why [Respondents] have gone to so much trouble to avoid compliance with FOIA, when compliance would consist of merely producing one page affidavits from two people easily located in Newark, NJ which say that the document requested never existed. Apparently, these two people are not willing to swear that the document requested never existed, so a document requested under FOIA in May 1999 still has not been produced as of June 2005.

District Court Docket No. 46 at 2, n.1.

The district court responded to Respondents' refusal to obey or appeal his final order by dismissing Petitioner's case based on a manufactured excuse designed by the district court to save face. Petitioner immediately called the clerk's office to inform the district court that Petitioner never received its December 16th "Fox Order," and then filed a motion for reconsideration stating all of the above. This motion was dismissed in a one sentence order without reference to any authority or even a word of analysis.

On this background, the case was appealed to the same panel a second time, this time by Petitioner. Thus, the same case was before the same circuit court panel on two different appeals, i.e., No. 05-5149 and No. 07-5071. On May 10th,

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Finally, the district court also improperly referred to Respondent's May 2005 "response statement" as a "motion to dismiss" and improperly treated it as such by granting the non-existent motion to dismiss due to Petitioner's failure to respond to the December 2006 "Fox Order." App. at 9a-12a. Apparently, the district court just pretended that the "response statement" was a motion to dismiss to provide further fallacious support for its unjustified decision to dismiss the case. This misstatement may be based on the fact that the May 2005 document concludes with the assertion that "[b]ecause all responsive records have been released to Plaintiff, this case is now moot and should be dismissed." District Court Docket No. 43 at 6. Nonetheless, it was not a motion to dismiss. It was not a motion of any kind. It was an allegedly factual "response" to the district court's *final order*. It just happens to request dismissal at the end of the factual response.

Respondents moved to have Petitioner's appeal, No. 07-5071, summarily dismissed, *i.e.*, dismissed without even the filing of regular appellate briefs. On May 23rd, Petitioner filed an opposition. On June 5th, the circuit court panel summarily dismissed Respondents' appeal, No. 05-5149. App. at 7a-8a. This dismissal was mere procedural housekeeping because appeal No. 05-5149 was moot at the time because the district court's February 2005 final order requiring production under FOIA had been replaced with its January 2007 dismissal of Petitioner's case. On August 8th, however, the panel also dismissed Petitioner's appeal, No. 07-5071, on Respondents' May 10th motion for summary dismissal. App. at 5a-6a.

REASONS FOR GRANTING THE PETITION

Review on a writ of certiorari should be granted in this Freedom of Information Act case because the District of Columbia Circuit below "has decided important federal question(s) in a way that conflicts with relevant decisions of this Court" and other U. S. Courts of Appeal and the Federal Rules of Civil Procedure. Furthermore, the D. C. Circuit below "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a), (c).

I. THE CIRCUIT COURT HAS VIOLATED BOTH FOIA ITSELF AND ITS OWN PRECEDENT

A. THE CIRCUIT COURT HAS ALSO ABUSED THE USE OF SUMMARY DISPOSITION

The circuit court's summary dismissal of appeal No. 07-5071 rejected the district court's rationale for the dismissal of the Petitioner's case, which was Petitioner's alleged failure to respond to the Fox Order. App. at 5a-6a, 9a-12a. Instead, the circuit court based its summary affirmance on its rejection of the district court's analysis on the merits in the February 2005 order. *Id.* Yet the circuit court cited no authority allowing summary affirmance on grounds not only different from those of the district court but on grounds explicitly rejected by the district court.

The circuit court cited only *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297-98 (D.C. Cir. 1987) as its authority for the appropriateness of summary affirmance, but said nothing about the analysis of the opinion or how it pertains to this case. App. at 5a-6a. *Taxpayers Watchdog* says that a party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified. *See also, Walker v. Washington,* 627 F.2d 541, 545 (D.C. Cir.), *cert. denied,* 449 U.S. 994 (1980). But since the circuit court affirmed the district court on grounds other than those relied upon by the district court, not only was the briefing of the motion for summary disposition abbreviated, it had absolutely nothing to

do with the circuit court's opinion. The briefing addressed the district court's procedural basis for dismissing Petitioner's case, and it did not mention FOIA. Apparently, Respondents met "the heavy burden of establishing that the merits of [their] case are so clear that expedited action is justified" without actually saying a single word about said merits. Even to summarily affirm an order of a district court on the grounds actually relied upon by the district court to resolve the case, an appellate panel opting for summary disposition must conclude that no benefit will be gained from further briefing and argument of the issues presented. *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985) (emphasis added). How much greater is this already heavy burden when the appellate panel rejects the grounds on which the district court resolved the case and the district court's decision on the merits is to be summarily overruled? The circuit court's summary affirmance requires the conclusion that United States District Court Judge Richard J. Leon's February 2005 decision demanding production of the Shwartz directive or affidavits on its whereabouts was not merely in error but was so ridiculously in conflict with controlling authority that its reversal was not only not worth the paper that would be consumed by normal appellate briefing but not even worth the paper that would be consumed by briefing the appropriate issue for summary dismissal. Clearly the circuit court panel's bare-bones three sentence decision, citing only *Valencia-Lucena v. U. S. Coast Guard*, 180 F.2d 321, 325 (D.C. Cir. 1999) on the requirements of FOIA, and saying absolutely nothing about the analysis of the opinion or how it is relevant to this case, comes

nowhere near such a showing.

Valencia was raised and relied upon by Petitioner in the district court, and it is explicitly relied upon in the district court's February 2005 order now overruled by the circuit court panel. App. at 17a-19a. The relevant part of *Valencia* is cited in the district court's opinion: "Where the sufficiency of a search is challenged, as here, the government has the burden of establishing beyond a material doubt that the search was reasonable [and] [a]n agency search is unreasonable if it fails to follow through on obvious leads to discover requested documents." App. at 17a-18a (citing *Valencia,* 180 F.3d at 325). In the next sentence, the district court again cited *Valencia* for the proposition that "[t]he D.C. Circuit has found that '[w]hen all other sources fail to provide the missing record, agency personnel should be contacted if there is a close nexus ... between the person and the particular record.'" App. at 17a (citing *Valencia,* 180 F.3d at 328). As opposed to the actual legal and factual analysis of the district court, the circuit court panel in rejecting that reasoning cited *Valencia* only for the general proposition that a FOIA search must be "reasonably calculated to uncover all relevant documents." App. at 6a (citing *Valencia*, 180 F.3d at 325).

In *Valencia*, the FOIA plaintiff sued the Coast Guard seeking disclosure of pages from a Coast Guard logbook. After disclosing summary sheets from a different logbook, the Coast Guard moved for summary judgment. The district court granted the motion, but the District of Columbia Circuit held that the inadequacy of the Coast Guard's search for

responsive documents precluded summary judgment in its favor. *Id.* at 323. The court reasoned that "[t]he fundamental principle animating FOIA is public access to government documents ... Accordingly, this court has required agencies to make more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents." *Id.* at 325 (citations omitted). "[I]f a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials, summary judgment is inappropriate." *Id.* at 326. The relevant core of *Valencia* is that when a particular person is suspected of having a specifically requested document, a reasonable search must involve a statement from that individual:

> ... Lieutenant Ross' declaration does not refer to Lieutenant Nesel, the Captain of the Monhegan at the relevant time, and there is nothing in the record to indicate that the lieutenant was contacted. Although we hardly suppose that the lieutenant retained possession of the logbook ... he would be a likely source for information about what happened to that logbook. When all other sources fail to provide leads to the missing record, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record. The undisputed connection between the missing logbook and Lieutenant Nesel should have led the Coast Guard to inquire of him as a source likely to turn up the information requested regarding the

missing logbook's whereabouts.

Id. at 327.

Similarly, the undisputed connection between the missing Shwartz directive and Magistrate Judge Shwartz and Mr. Orsini should have led Respondents to inquire of them as sources under oath. Yet Respondents do not even attempt to excuse their failure to get sworn statements, or any statements at all for that matter, from Shwartz or Orsini. Thus the circuit court panel has lazily cited nothing but one of the FOIA cases which most clearly undermines its decision, selectively taking from it only the vague bromide that a FOIA search must be "reasonable." But since the panel affirmed dismissal on grounds rejected by the district court, it received no briefing on FOIA, not even the reduced briefing associated with a motion for summary affirmance, and then lazily entered a three sentence opinion which logically requires a finding of incompetence on the part of the district court judge. It appears that either the circuit court's summary affirmance is an effort to cover up document destruction violating FOIA by fellow members of the legal system or it is simply an avoidance of work. In any event, in no way does *Taxpayers Watchdog* support such a result.

Furthermore, part of the "heavy burden" associated with summary disposition is that the circuit court was obligated to view the record and the inferences to be drawn therefrom "in the light most favorable to [Petitioner]." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). This mandates the inference that Respondents, along with an FBI agent

and a former federal prosecutor who is now United States Magistrate Judge, have destroyed or hidden a document precisely because it was specifically identified and requested under FOIA. This conclusion required the circuit court to remand the case to the district court for enforcement of its February 2005 order through a referral to the Office of Special Counsel pursuant to 5 U.S.C. § 552(a)(4)(F)[6] or through contempt proceedings against those responsible for the illegal destruction pursuant to 5 U.S.C. §552(a)(4)(G).[7] See also, *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 34 F. Supp. 2d 28, 43 (D. D.C. 1998) (regarding other options). Plainly, the circuit court did not view the

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[6] 5 U.S.C. § 552(a)(4)(F) ("Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends").

[7] 5 U.S.C. § 552(a)(4)(G) ("In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member").

record as required under *Diebold* for summary disposition.

B. EVEN UNDER THE NORMAL STANDARDS OF APPELLATE REVIEW THE CIRCUIT COURT HAS VIOLATED FOIA ITSELF AND ITS OWN PRECEDENT

The District of Columbia Circuit has forbidden the use of summary judgment to dismiss a FOIA request when there is any evidence contradicting the declarations of the producing government office in support of its refusal to produce requested material. *Washington Post Co. v U.S. Department of State,* 840 F.2d 26 (D.C. Cir. 1988), *vacated on other grds*, 898 F.2d 793 (D.C. Cir 1990):

> Facing controverted issues of fact, the District Court proceeded to resolve a pivotal conflict in the affidavits respectively tendered by the Post and the State Department on the cross-motions for summary judgment. Courts are forbidden, however, to conduct trial by affidavit and thus deprive litigants of their right to an evidentiary hearing on issues of fact. As we have said in the past, '[w]e think there is a right of confrontation ... and so the parties should have the right to examine the affiants either by depositions or in open court ... [T]he case should be tried like any other adversary proceeding' ... This

> limitation on the use of summary judgment is not a mere technicality. The integrity of a court's de novo judgment rests upon an adversarial system of testing for truth when critical adjudicative facts are subjects of a contest. Obviously, the more difficult the issues and equal the weight of expert opinion in a case, the greater the role that process plays in honing the court's judgment. It is no wonder, then, that we have recognized 'the advantages of adversary procedures in testing the strength of the government's position in FOIA cases,' and have declared that '[t]he importance of maximizing adversary procedures in suits such as this cannot be gain-said.' On remand, the District Court must heed these teachings, and resort to some salutary alternative to summary judgment.

Id. at 30-31.

Moreover, this bar to judgment without exercise of a FOIA requestor's right to examine the government affiants either by depositions or in open court remains true even when the producing agency makes claims of some relevant superior expertise, and there is no such claim presented here. *Id.* at 36 - 37 ("Much of the content of the Department's affidavits is contradicted by concrete evidence identified by the Post. And whatever weight the opinion of the Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence"). The courts have uniformly

held that discovery in a FOIA case is permitted when factual issues arise about the "adequacy or completeness of the government search and index" and these issues can arise only after the government files its affidavits and supporting memorandum of law. *Murphy v. Federal Bureau of Investigation,* 490 F. Supp. 1134, 1137 (D. D.C. 1980).[8]

Additionally, the District of Columbia Circuit has held that the government's reasonable search burden changes in response to information the agency receives regarding where it should search. *Campbell v. U.S. Dept. of Justice*, 164 F.3d 20 (D.C. Cir. 1999). An agency has discretion to conduct a standard search in response to a general request, but it must revise its assessment of what is "reasonable" in a particular case to account for leads that emerge during its inquiry. *Id.* at 28. Petitioner agrees that if a FOIA plaintiff merely complains generally that there is probably more responsive material "out there," the agency can defensively cite cases which merely call for a "reasonable search." Petitioner's years of protest, however, regarding the very narrow and specific subject of the Shwartz directive certainly

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[8]Such abuse is especially egregious here in that the fact-finding without adversary procedures was performed by appellate court judges who decided to reverse the district court's findings in blatant disregard of countervailing evidence. Appellate courts are prohibited from engaging in fact-finding altogether. *See, e.g., New England Tank Industries of New Hampshire, Inc. v. United States*, 865 F.2d 243, 245 (Fed. Cir. 1989) ("It is, of course, axiomatic that an appellate court must not 'find its own facts'").

constitutes information regarding where the agency should have searched.[9]

There is no doubt that the federal courts of the District of Columbia can determine when documents requested under FOIA have been destroyed or withheld. In *Kronberg v. United States Department of Justice,* 875 F. Supp. 861, 871 (D. D.C. 1995), the same district court in this case held that essentially the same Respondents in this case failed to meet the reasonable search requirement. The FOIA requesters in *Kronberg* contended that the very same part of the very same agency involved in this case, DOJ/EOUSA, had falsely asserted that certain records searched for simply did not exist. *Id.* at 870-

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[9]The District of Columbia Circuit's decision in *The Nation Magazine v. United States Customs Service*, 71 F. 3d 885, 890 (D.C. Cir. 1995) makes the same point. This Circuit reached the conclusion that the Customs Service failed to turn up a particular document (the 1981 Chadwick memo) specifically identified by the plaintiff and remanded the case. *Id.* at 890-92. On remand, the district court also emphasized this particular document. *The Nation Magazine v. United States Customs Service*, 937 F. Supp. 39, 42-45 (D. D.C. 1995). It held that a reasonable search for specifically identified documents "necessitates that Customs make an inquiry of a Customs employee who would have been in a position at the time of the alleged project to have knowledge of such a project, or who would have been involved with such a project, so that Customs might perform a fruitful search ..." *Id.* at 43. It also held that "personal copies" of agency documents kept by retired employees but perhaps not in government files are also agency records subject to the FOIA. *Id.* at 43, n.2. The opinion then concludes with an order to the Customs Service to find this particular memorandum. *Id.* at 45

71. Indeed, some of the agency's sworn representations found wanting in *Kronberg* were prepared by the very same Mr. Boseker who made similar representations for EOUSA in this case. The court held the DOJ search unreasonable because "in some instances, the government provides documentation of a request for authorization, but no documentation of responses, and, in other instances, it supplies documentation of responses but no documentation of requests." *Kronberg,* 875 F. Supp. at 870-71. "In both situations, [DOJ] fails to provide the actual records whose existence was documented." "Obviously, much is missing." *Id.* The documentation of the transfer of the USAO/NJ report to FBI Newark and the alleged absence of any documentation terminating the FBI investigation also suggests that much is missing.

There is also no doubt that the federal court of the District of Columbia know how to enforce FOIA in the face of recalcitrance from government employees and officers. They demonstrated that knowledge in *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 470 F.3d 363 (D.C. Cir. 1998):

> There is substantial evidence that the [United States Department of Commerce (DOC)] has destroyed documents and removed documents from its control in an effort to avoid releasing them to Judicial Watch. If the Court were to grant the DOC's motion and merely order a new search, these documents would not be found even by the most exhaustive of searches, and the DOC would have

succeeded in circumventing the FOIA ... The courts cannot be powerless to remedy FOIA violations where the agency simply discards potentially damaging responsive documents. There must be some mechanism by which the courts can keep the agencies from circumventing the FOIA by simply removing responsive documents from [their] control ... The District Court thus concluded that 'further discovery is required' and authorized Judicial Watch to inquire into any discoverable information related to the destruction or removal of documents' during the first search, including 'some inquiry into the creation and handling of documents' ... The District Court appointed a Magistrate Judge to supervise discovery, but cautioned that 'Judicial Watch should not be allowed to stray from inquiries that might be reasonably calculated to lead to evidence of unlawful destruction or removal of documents'... Judicial Watch conducted extensive discovery (both before and after DOC completed its second search in March 2000), issuing numerous document requests and deposing nearly 20 individuals, including current and former employees of DOC and the [Democratic National Committee (DNC)], as well as suspected trade mission participants. Deposition questioning covered DOC's alleged misconduct during the first search; inquired about possible locations of missing documents; and probed circumstances

> surrounding the creation of documents,
> the trade missions themselves,
> background information about the deponents,
> and a number of tangential issues.

Id. at 366-67.

In this case, the district court did not order depositions of Magistrate Shwartz and Mr. Orsini, but merely that they produce the Shwartz directive or sign declarations explaining its unavailability. Nonetheless, even under the standards of summary disposition, the circuit court overruled the district court's decision on this matter without receiving any briefing at all. The stark contrast between this circuit court's vigorous enforcement of FOIA in *Judicial Watch, Kronberg, The Nation Magazine, Campbell, Murphy v. FBI, Washington Post v State Department,* and *Valencia* versus its complete disregard of FOIA in this case leaves the impression that the circuit surreptitiously and illegally refuses to apply FOIA to a fellow federal magistrate judge and to other members of the legal system. If the Shwartz directive does not exist and has not been illegally destroyed, why would any intelligent person have EOUSA personnel review the whole file when affidavits from Shwartz and Orsini could address the matter directly and definitively? Why waste such time and effort unless the whole purpose is to then cynically refer to all this pointless activity in a FOIA defense? This interpretation of FOIA clearly invites certain favored government officials to hide or destroy embarrassing documents and then invite people who are completely uninvolved in the matter to search for the now "missing" documents and then

vouch for their absence from the files, thereby making the enforcement of FOIA against these favored government officials both expensive and pointless. One hopes that the United States Supreme Court does not consider such an illegal immunity to FOIA, created not by Congress but by sheer judicial lawlessness, to be one of the perks that members of the judiciary give to each other. One would also hope that the United States Supreme Court will correct this obvious injustice.

CONCLUSION

The panel decision granting Respondents' motion for summary affirmance should be reversed and this matter returned to the panel for normal appellate briefing or at least summary briefing on the matter now at issue. The circuit court should then be required to produce competent legal analysis consistent with precedent, rather than a mere nonsensical listing of three citations.

DATED: 19 February 2008

Respectfully submitted,

Wagner D. Jackson, Jr.
2606 Finch Street
Silver Spring, MD 20902
(301) 649-6988 (home)
(202) 616-4222 (work)
Petitioner *pro se*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5071 September Term, 2007
00cv01315

Filed On:

[DATE STAMP]
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED NOV 20 2007
CLERK

Wagner D. Jackson, Jr.,
Appellant

v.

U.S. Attorney's Office, District of New Jersey, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Deputy Clerk/LD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5071 September Term, 2006
00cv01315

Filed On:

[DATE STAMP]
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED AUG - 8 2007
CLERK

[STAMP]
MANDATE
Pursuant to the provisions of Fed R. App.Pro.41(a)
ISSUED: 11/30/07
BY: /s/
ATTACHED: ___ Amending Order
___ Opinion
___ Order on Costs

Wagner D. Jackson, Jr.,
Appellant

v.

U.S. Attorney's Office, District of New Jersey, et al.,
Appellees

BEFORE: Sentelle, Rogers, and Brown, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). This court may affirm the district court's decision on grounds different from those upon which the district court relied. *See Jenkins v. Washington Convention Ctr.,* 236 F.3d 6, 8 n.3 (D.C. Cir. 2001). Accordingly, the district court's disposition of this Freedom of Information Act case is affirmed on the ground that appellees have demonstrated that their search was "reasonably calculated to uncover all relevant documents." *See Valencia-Lucena v. U.S.C.G.,* 180 F.3d 321, 325 (D.C. Cir. 1999) (citation omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/s/
/s/
/s/

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5071 September Term, 2006
00cv01315

Filed On:

[DATE STAMP]
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED AUG - 8 2007
CLERK

Wagner D. Jackson, Jr.,
Appellant

v.

U.S. Attorney's Office, District of New Jersey, et al.,
Appellees

BEFORE: Sentelle, Rogers, and Brown, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). This court

may affirm the district court's decision on grounds different from those upon which the district court relied. *See Jenkins v. Washington Convention Ctr.*, 236 F.3d 6, 8 n.3 (D.C. Cir. 2001). Accordingly, the district court's disposition of this Freedom of Information Act case is affirmed on the ground that appellees have demonstrated that their search was "reasonably calculated to uncover all relevant documents." *See Valencia-Lucena v. U.S.C.G.*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citation omitted).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/s/
/s/
/s/

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5149 September Term, 2006
00cv01315

Filed On:

[DATE STAMP]
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUN - 5 2007
CLERK

Wagner D. Jackson, Jr.,
Appellee

v.

U.S. Attorney's Office, District of New Jersey, et al.,
Appellants

Faith Hochberg,
Appellee

07-5071 00cv01315

Wagner D. Jackson, Jr.,
Appellant

v.

U.S. Attorney's Office, District of New Jersey, et al.,
Appellees

ORDER

Upon consideration of appellants' motion to dismiss appeal No. 05-5149 and appellee Jackson's response thereto, it is

ORDERED that the motion to dismiss Federal appellants' appeal be granted, and No. 05-5149 is hereby dismissed. The on-going appeal in No. 07-5071 is unaffected by this order.

The Clerk is directed to transmit forthwith to the district court a certified copy of this order in lieu of formal mandate in No. 05-5149.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Nancy G. Dunn
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[DATE STAMP]
FILED
JAN 8 - 2007
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

WAGNER D. JACKSON, JR.,
Plaintiff,

v. Civil case No. 00-1315 (RJL)

UNITED STATES ATTORNEYS OFFICE,
DISTRICT OF NEW JERSEY, *et al.*,
Defendants.

ORDER
(January 4, 2007) (#49)

On February 22, 2005, this Court granted summary judgment to plaintiff and ordered the United States Attorney's Office for the District of New Jersey to conduct searches related to the investigations initiated as a result of plaintiff's complaint alleging perjury violations against the witnesses of "The Right Stuff," and to discuss the "written directive" with various relevant parties. (Mem. Op. and Order of Feb. 22, 2006 at 5.) On May 19, 2005, defendants filed a Motion to Dismiss to "respond to the Court's Order and Final Judgment dated February 22, 2005." (Mot. Dismiss at 1.) Defendants assert that the matter is now moot, and

that the case should be dismissed. Plaintiff has failed to respond, and on December 16, 2006, the Court issued a "*Fox* Order" informing the plaintiff, who is proceeding *pro se*, that he must respond by December 30, 2006. *See Fox v. Strickland*, 837 F.2d 507 (D.C. Cir. 1988). Plaintiff has failed to respond.

Local Civil Rule 7.1(b) states that an opposing party must file a memorandum of points and authorities in opposition to a motion within eleven days of the date of service and that "if such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded." The authority of the district court to enforce this rule has been affirmed by the D.C. Circuit. *See FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997) (finding that "the discretion to enforce ... [Rule 7.1 (b)] lies wholly within the district court"). Even holding the plaintiff's pleadings to the less stringent standard afforded *pro se* litigants, *see Haines v. Kerner,* 404 U.S. 519, 520 (1972), the Court concludes that the motion to dismiss should be granted.

In consideration of the fact that plaintiff was given notice of the consequences of failing to respond, and the amount of time that has passed, it is, this 4th day of January, 2007, hereby

ORDERED that defendants' motion to dismiss [#43] is GRANTED; and it is further

ORDERED that this case be dismissed against all defendants.

SO ORDERED.

/s/
RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

1:00-cv-1315 Notice will be delivered by other means to:

WAGNER D. JACKSON, JR
2606 Finch Street
Silver Spring, MD 20902

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5149 September Term, 2004
00cv01315

Filed On:

[DATE STAMP]
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
AUG 26 2005
CLERK

Wagner D. Jackson, Jr.,
Appellee

v.

U.S. Attorney's Office, District of New Jersey, et al.,
Appellants

Faith Hochberg,
Appellee

BEFORE: Sentelle, Henderson, and Brown, Circuit Judges

ORDER

Upon consideration of the motion to hold the appeal in abeyance and the opposition thereto, it is ORDERED that the motion be granted and the appeal held in abeyance pending district court action

on appellants' motion to dismiss. The parties are directed to file motions to govern further proceedings within 30 days of the district court's disposition of the motion to dismiss.

The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

/s/
/s/
/s/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[DATE STAMP]
FILED
FEB 23 2005
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

WAGNER D. JACKSON, JR.,
Plaintiff *pro se,*

v. Civil case Number 00-1315 (RJL)

UNITED STATES ATTORNEYS OFFICE,
DISTRICT OF NEW JERSEY, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER
(February 22nd, 2005) (#33, 35)

Before the Court are the parties' renewed cross motions for summary judgment regarding whether the government conducted a sufficient search to satisfy its Freedom of Information Act ("FOIA") obligations. For the following reasons, the Court GRANTS summary judgment in favor of the plaintiff.

BACKGROUND

The relevant facts relating to these motions are straight forward and were set forth in greater particularity in this Court's initial decision in this

case in August 2003. *Jackson v. U.S. Attorneys Office*, 293 F. Supp. 2d 34 (D.D.C. 2003). Suffice it to say that the plaintiff, Mr. Jackson, asked the United States Attorney for the District of New Jersey ("USAO/NJ") to investigate allegations of perjury by witnesses of a company, "The Right Stuff," he sued for racial discrimination. Patty Schwarz, the Chief of the USAO/NJ Criminal Division referred the matter to the Federal Bureau of Investigation ("FBI") for investigation.

In May 1999, Mr. Jackson learned from Special Agent Brad Orsini of the FBI's office in Newark that Ms. Schwarz had issued a written directive to terminate the investigation ("written directive"). To date, however, the written directive has not been produced to Mr. Jackson in response to his FOIA request, which sought "copies of all non-privileged documents relating to [the] decision [of the USAO to not prosecute plaintiff's perjury complaint]." Pl. Mot. for Summ. J. Attachment 3 at 9.

ANALYSIS

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment may support its motion by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a

genuine issue of material fact." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED. R. CIV. P. 56). In opposing summary judgment, the "nonmoving party [must] go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting FED. R. CIV. P. 56). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

When a plaintiff challenges the adequacy of the FOIA search conducted by an agency, the government is entitled to summary judgment only if it shows that the search conducted was "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Although the agency's search need not be an exhaustive search, the Court's determination of adequacy will depend on the facts and circumstances of each case. *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

When the sufficiency of a search is challenged, as here, the government has the burden of establishing beyond a material doubt that the search was reasonable. *Id.* at 542. An agency's search is unreasonable if it fails to follow through on obvious leads to discover requested documents. *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C. Cir. 1999). The D.C. Circuit has found that

"[w]hen all other sources fail to provide leads to the missing record, agency personnel should be contacted if there is a close nexus ... between the person and the particular record." *Id.* at 328.

In response to this Court's Memorandum Opinion and Order on August 30, 2003, the government supplemented the record with the Declaration of Lisa H. Jones, a Paralegal Specialist with the USAO/NJ. Jones Decl. ¶ 1. Ms. Jones stated that neither Ms. Schwarz, nor the Paralegal Specialist who originally handled the Jackson FOIA request, were still with the USAO/NJ. Jones Decl. ¶ 6. Further, Ms. Jones described the searches and contacts made by the original Paralegal Specialist. *Id.* Moreover, Ms. Jones "conduct[ed] a second search for records responsive to Mr. Jackson's FOIA/PA request to determine the location of any and all files relating to him." *Id.* ¶ 8. Ms. Jones identified the individuals she spoke with relating to this matter and described the electronic searches she conducted. *Id.* ¶¶ 7-11. Ms. Jones ultimately concluded that "[t]here were no other places ... to search for records pertaining to Mr. Jackson and no other files likely to contain responsive materials." *Id.* ¶ 12. However, there is nothing in the record to demonstrate: (1) that USAO/NJ conducted searches relating to the witnesses for "The Right Stuff," who were supposedly the subject of the perjury investigation that Ms. Schwarz purportedly terminated with a written directive; and (2) that USAO/NJ contacted, by telephone or in person, either Ms. Schwarz, who allegedly wrote the written directive, or Special Agent Orsini, who told Mr.

Jackson about the written directive.

Accordingly, the Court is not convinced that the search conducted for documents "pertaining to Mr. Jackson" was reasonably likely to turn up potential documents relating to the investigation Mr. Jackson requested against the witnesses for "The Right Stuff." The Court thus finds that USAO/NJ failed to adequately conduct a search that would produce documents responsive to Mr. Jackson's FOIA request.

Moreover, because there is a close nexus between Ms. Schwarz, Special Agent Orsini, and the written directive that has yet to be produced, this Court finds that the USAO/NJ's search was *per se* unreasonable because the agency failed to contact either Ms. Schwarz or Special Agent Orsini regarding the whereabouts of the written directive. Accordingly, the plaintiff's Second Motion for Summary Judgment is granted and the defendants' Renewed Motion for Summary Judgment is denied.

ORDER

For the reasons set forth above, it is this __ day of February, 2004 hereby

ORDERED that the Plaintiff's Second Motion for Summary Judgment [# 35] is GRANTED, and it is further

ORDERED that the Defendant's Renewed Motion for Summary Judgment [# 33] is DENIED,

and it is further

ORDERED that the defendant conduct searches in its files and directories relating to the investigation(s) initiated as a result of Mr. Jackson's complaint alleging perjury violations against the witnesses of "The Right Stuff." The USAO/NJ has 90 days to produce any responsive information or documents resulting from these searches to Mr. Jackson, and it is further

ORDERED that the defendant contact and discuss the written directive with Ms. Schwarz and Special Agent Orsini. The USAO/NJ has 90 days to either produce the written directive or to produce written, affidavits from Ms. Schwarz and Special Agent Orsini regarding the prior existence, and present whereabouts, of the written directive, and it is further

ORDERED that judgment be entered in favor of the plaintiff.

SO ORDERED.

/s/
RICHARD J. LEON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[DATE STAMP]
FILED
AUG 30 2003
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

WAGNER D. JACKSON, JR.,
Plaintiff

v. Civil case Number 00-1315 (RJL)

UNITED STATES ATTORNEYS OFFICE,
DISTRICT OF NEW JERSEY, *et al.*,
Defendant.

MEMORANDUM OPINION AND ORDER
(August 30th, 2003) (#13, 14)

Now before the Court are plaintiff's and defendants' cross motions for summary judgment. Plaintiff, Wagner D. Jackson ("Jackson") brings the instant action under the Freedom of Information Act (FOIA) seeking records from the defendants[1], the

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[1]The plaintiff's suit names the following defendants: the United States Attorney's Office for the District of New Jersey ("USAO/DNJ"); Faith Hochberg of the USAO/DNJ; the United States Department of Justice, Executive Office of the United States Attorney ("EOUSA"); the United States Attorney General; and the United States District Attorney for the District of Columbia.

United States Attorneys Office for the District of New Jersey ("USAO," "USAO/DNJ"), *et al.* (collectively, "the government"), that relate to the USAO's decision to not prosecute or investigate a complaint filed by the plaintiff in April 12, 1999. The defendant maintains that an adequate search was performed in response to the FOIA request and that all responsive documents were turned over to plaintiff. Those that were not, according to the defendants, are exempt from the FOIA's disclosure requirements.

After reviewing the parties' motions and the relevant law, the Court denies in part both defendants' and plaintiff's motion for summary judgment in regard to the adequacy of the FOIA search. As the defendants' affidavits fail to set forth in the degree of detail that this Circuit requires, the Court is unable to evaluate the adequacy of the FOIA search. However, the Court finds that the government properly invoked FOIA Exemption 5 when withholding certain documents from the plaintiff and therefore grants in part the defendants' motion for summary judgment.

BACKGROUND

Plaintiff's FOIA request to the United States Attorney's Office for the District of New Jersey ("USAO/DNJ") stems from a civil case filed by plaintiff in the United States District Court for the District of New Jersey. In that case, plaintiff claimed that a dating service called "The Right Stuff" had discriminated against him on the basis of race when

it discharged him from the service. The district court dismissed plaintiff's case and, subsequently, the Third Circuit affirmed on January 29, 1999. *See Jackson v. The Right Stuff, et al.,* C.A. No, 98-6113 (3rd Cir. Jan.. 28, 1999).

Following the dismissal of his racial discrimination claim, plaintiff wrote the office of the United States Attorney for the District of New Jersey on April 12, 1999, and asked it to investigate acts of perjury allegedly committed during the course of plaintiff's civil suit by witnesses for the "The Right Stuff." According to the plaintiff, the Chief of the USAO/DNJ Criminal Division, Patty Schwarz, referred the matter to the Federal Bureau of Investigation ("FBI") for investigation.

Approximately one month later, on May 10, 1999, plaintiff contends that FBI Agent Brad Orsini contacted him and told him that, pursuant to a "written directive" from the USAO/DNJ, the investigation of plaintiff's perjury complaint had ended as the USAO had decided against prosecuting the charge.[2] That same day, plaintiff wrote a second

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[2]In their motion for summary judgment, defendants never mention plaintiff's April 12 letter, nor do they contest or otherwise acknowledge plaintiff's alleged conversation with FBI Agent Orsini, during which plaintiff claims Orsini told him that the investigation had been dropped at the directive of the USAO/DNJ. Defendants do, however, acknowledge plaintiff's May 10, 1999, letter to the USAO/DNJ in which he again made a perjury complaint against witnesses for "The Right Stuff," and stated that his April 12, 1999, request that the USAO investigate the alleged perjury had been denied.

letter to the USAO/DNJ, in which he again made a perjury complaint against witnesses for "The Right Stuff." In addition to asking the USAO to investigate the perjury allegation, plaintiff also asked the office to release, pursuant to FOIA, 5 U.S.C. § 552, "copies of all non-privileged documents relating to [the] decision" not to prosecute the witnesses for "The Right Stuff." According to both plaintiff and defendants, the USAO/DNJ forwarded Jackson's FOIA request to the Executive Office for United States Attorneys ("EOUSA"). Three months later, on August 13, 1999, the EOUSA released 141 pages of responsive materials to the plaintiff with a letter informing him that his FOIA request had been processed, and that two pages of material had been withheld pursuant to FOIA exemption 5, as the materials were part of the USAO's deliberative process.

Plaintiff contends that defendants have violated FOIA's requirements in two ways. First, Jackson argues that the USAO/DNJ and the EOUSA failed to conduct a reasonable search for the documents he requested in violation of FOIA. In particular, Jackson takes issue with the defendants' failure to discover the "written directive," or memorandum, from AUSA Schwarz to Agent Orsini stating that the USAO had decided not to prosecute Jackson's perjury complaint. Second, Jackson claims that the materials defendants have withheld pursuant to FOIA Exemption 5 are not part of the defendants' deliberative processes and therefore must be released.

ANALYSIS

Plaintiff and defendants have filed cross motions for summary judgment, as well as opposition and reply motions.

Summary judgment is appropriate under Federal Rule 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). All evidence presented must be construed in favor of the non-moving party. *See Anderson v. Liberty Law, Inc.*, 477 U.S. 242, 255 (1986).

To determine which facts are material, the Court must examine the substantive law underlying the claim. *See Anderson*, 477 U.S. at 248. A "genuine issue" is one whose resolution could establish an element of a claim or defense, thereby affecting the outcome of the action. *See Celotex*, 477 U.S. at 322. Additionally, to be genuine, an issue must be supported by sufficient admissible evidence such that a reasonable trier-of- fact could find for the nonmoving party. *See Laningham v. United States Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987). An adverse party's or non-moving party's mere allegations or denials are insufficient to defeat an otherwise proper motion for summary judgment Instead, the nonmoving party must present, by affidavits or otherwise, specific facts that

demonstrate there is a genuine issue for trial. *See id.* at 1248-49.

In regard to the adequacy of the FOIA search conducted by the defendants in this case, the government is entitled to summary judgment on this point only if it shows that the search was "reasonably calculated to uncover all relevant documents." *Weisberg v. United States Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). *See also Oglesby v. United States Dept. of the Army*, 920 F.2d 57, _ (D.C. Cir. 1990); *Truitt v. Dept. of State,* 897 F.2d 540, 542 (D.C. Cir. 1990). The agency need not conduct an exhaustive search in order to comply with the FOIA. Rather, the adequacy of the government's search depends on the facts and circumstances of each case. *See Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

A. Adequacy of the FOIA Search

As the adequacy of the search depends turns on the facts of each case, the Court must necessarily review the scope of Jackson's FOIA request. In his letter to the USAO/DNJ dated May 10, 1999, Jackson requested "copies of all non-privileged documents related to this decision [of the USAO to not prosecute plaintiff's perjury complaint] pursuant to the Freedom of Information Act, 5 U.S.C. § 552." Pl.'s Mot. for Summ. J. Ex. (letter to the USAO/DNJ). According to the declaration of John F. Boseker, an attorney-advisor with the FOIA unit of the EOUSA, each document reviewed in response to Jackson's FOIA request was located in the Criminal

Case File System of the offices of the USAO/DNJ. *See* Boseker Decl. ¶ 13. Additionally, Boseker explained that the documents were "maintained ... as part of an [*sic*] criminal investigatory file opened regarding Mr. Jackson's allegation of perjury .. .." *Id.* While Boseker "personally reviewed all the materials identified by the USAO/DNJ as the complete Jackson file," and spoke to AUSA Susan Cassell of the USAO/DNJ, who assured him "that the complete file possessed by the District of USAO/DNJ had been forwarded for review," Boseker's declaration is bereft of the type of detail this Court needs in order to assess whether the search was, in fact, reasonable and adequate. As this Circuit stated in *The Nation Magazine, Washington Bureau v. United States Customs Service,* 71 F.3d 885, 890 (D.C. Cir, 1995) ("*Nation Magazine*"), in order for the government to demonstrate at the summary judgment stage that the search was reasonably calculated to produce relevant documents, "the agency must set forth sufficient information in its affidavits for a court to determine that if the search was adequate." The affidavits must be "reasonably detailed," and include the search terms used by the agency when performing the search, the type of search performed, and an averment that "all files likely to contain responsive materials (if such records exist) were searched." *Weisberg v. United States Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

A cursory review of Boseker's declaration quickly reveals that it does not meet the standard set forth in *Nation Magazine* and *Weisberg* for establishing the reasonableness and adequacy of a

FOIA search. In essence, Boseker merely states that he reviewed the file put before him by the USAO for the District of New Jersey as the "complete Jackson file." Nowhere in his declaration does he explain what kind of search was conducted or procedure followed by the USAO to compile the documents which ultimately constituted the Jackson file. Moreover, although Boseker maintains that all records reviewed in conjunction with plaintiff's FOIA request were located in the Criminal Case File System, he does not aver in his declaration - as required by this Circuit in Nation Magazine that all files likely to contain responsive materials ... were searched." *Nation Magazine,* 705 F.2d at 1351.

A similar situation to this was presented to this Circuit in *Steinberg v. United States Dept. of Justice*, 23 F.3d 548 (D.C. Cir, 1994). In *Steinberg*, as in this case, the EOUSA described in a general manner how it processed FOIA requests but "fail[ed] to describe in any detail what records were searched, by whom, and through what process." *Id.* at 552-53. Additionally, when pressed by the court in oral argument regarding the particulars of the search, the EOUSA in *Steinberg* could only state that it had "contacted the [Boston] United States Attorney's Office and was informed that no records responsive to the request had been located." *Id.* (quoting a declaration submitted by the EOUSA). As this Circuit found in *Steinberg*, this Court also finds that the affidavit's general statements prevent the Court from assessing the adequacy of the FOIA search and, therefore, granting the government's motion for summary judgment.

Because the defendants have not submitted sufficiently detailed affidavits, the Court cannot evaluate the reasonableness and adequacy of the FOIA search and, as a result, must deny both plaintiff's and defendant's motion for summary judgment on this point. Accordingly, the Court orders the defendants to provide additional and more detailed affidavits explaining how the Jackson file was compiled. Those affidavits must meet the standard already set forth by this Circuit in *Weisberg, Nation Magazine*, and *Steinberg*. When these affidavits are presented to the Court, the parties may renew their cross motions for summary judgment as to this claim.

B. Applicability of FOIA Exemption 5

In addition to challenging the adequacy of the FOIA search, plaintiff also argues that defendants have improperly withheld two pages of material by maintaining that they are predecisional and deliberative records covered by Exemption 5 of the FOIA. As the Court finds that the government properly withheld these documents, the Court hereby denies plaintiff's motion for summary judgment and grants defendant's motion for summary judgment on this point.

Exemption 5 of the FOIA, set forth in 5 U.S.C. § 552(b)(5) provides that "interagency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency" are not subject to disclosure. Typically, this exemption applies to documents

"which would normally be 'protected' in civil discovery." *Jiminez v. Federal Bureau of Investigation, et al.*, 938 F. Supp. 21,28 (D.D.C. 1996). Among those documents protected in civil discovery, and therefore covered by FOIA Exemption 5, are deliberative process and attorney work product materials. *See National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *EPA v. Mink,* 410 U.S. 73, 86 (1973); *Coastal States Gas Corp. v. United States Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (stating that "[a]nother traditional area of privilege which has been recognized under Exemption 5 is attorney work-product."). While the work product privilege provides a "'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories," the doctrine protects only those documents "prepared in contemplation of litigation." *Coastal States*, 617 F.2d at 864.

After examining Boseker's affidavit, the Court concludes that the two pages of materials are exempt from FOIA under the attorney work product privilege. The affidavit clearly establishes that the notes were prepared during the investigation of Jackson's complaint and in anticipation of litigation, as they describe:

> ... evidence obtained in the course of the inquiry, evaluation of the case, and reasons to decline prosecution.
>
> ... reflect such matters as trial

> preparation, trial strategy, interpretations, and personal evaluations and opinions pertinent to the investigation by the USAO of the alleged criminal perjury case. The records were prepared by an attorney or at an attorney's request or direction, and made in anticipation of litigation ....
>
> In addition, these same pages, contain deliberative process of the U.S. Attorney's office in considering the possible criminal actions. To disclose this information would reveal pre-decisional communications among government personnel (i.e., discussions of various litigation issues, alternatives, and strategies), which would jeopardize the candid and comprehensive considerations essential for efficient and effective agency decision-making.

Boseker Aff. ¶¶ 16-18. Because these notes, as described by Boseker, "set forth the attorney's theory of the case and his litigation strategy," the Court finds that the material falls within the boundary of the work product privilege and, therefore, Exemption 5 of the FOIA. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (explaining that "Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 ...."). The fact that the litigation for which the document was prepared – presumably, a prosecution of Jackson's perjury complaint – did not occur or has

otherwise been terminated does not prevent the government from properly invoking Exemption 5. *See Federal Trade Comm'n v. Grolier Inc.,* 462 U.S. 19, 28 (1983) (holding that "under Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.").

The Court also concludes that the deliberative process privilege of Exemption 5 applies to the investigating AUSA's notes. The defendants, through the Boseker affidavit, have demonstrated both prongs of the test set forth by this Circuit in *Coastal States Gas Corp. v. United States Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) for invoking this privilege: (1) that the document is "predecisional," that is, "it was generated before the adoption of an agency policy," and (2) that the document is "deliberative," meaning that it "reflects the give-and-take of the consultative process."

Considering the second prong first, the Court has no difficulty determining that the investigating AUSA's notes represent the "give and take" of the office's processes. As the two-pages of handwritten noted reflect the personal opinions of the investigating AUSA, such as his or her evaluation of the case and reasons the USAO should decline prosecution. they are part and parcel of the USAO/DNJ's decisionmaking processes regarding criminal prosecutions. *See Jiminez*, 938 F. Supp, 21, 28-29 (D.D.C. 1996) (holding that documents of the U.S. Attorney's Office pertaining to "possible criminal actions" are properly withheld under

Exemption 5 as "[d]isclosure of this information would reveal predecisional and deliberative communications ... and could undermine the candid and comprehensive considerations essential for efficient agency decisionmaking."). Releasing these documents, the Court believes, "would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Formaldehyde Inst. v. Department of Health and Human Services,* 889 F.2d 1118, 1122 (D.C. Cir. 1989). Preserving the quality of agency decisionmaking processes by protecting candid discussions of policy, legal matters, and agency personnel's recommendations and suggestions is the reason why FOIA Exemption 5 was enacted by Congress. *See Sears, Roebuck & Co.,* 421 U.S. at 150.

In addition, the Court also finds that the defendants have demonstrated the predecisional nature of the investigating AUSA's notes. From Boseker's description, the document clearly was drafted during the course of the investigation as part of the deliberative processes of the USAO/DNJ in deciding whether to prosecute a criminal complaint, and does not represent a final agency decision.

As the defendants have properly invoked exemption 5 of the FOIA by demonstrating that the notes of the investigating AUSA are covered by the work product and deliberative process privileges the Court hereby grants defendant's motion for summary judgment and denies plaintiff's motion for summary judgment on this claim.

CONCLUSION

For the reasons set forth above, the Court hereby

ORDERS that the defendants' motion for summary judgment is GRANTED in part and, accordingly, summary judgment is granted for the defendant as to plaintiff's claim that defendants improperly invoked Exemption 5 of FOIA; plaintiff's motion for summary judgment as the applicability of Exemption 5 is therefore DENIED;

ORDERS that plaintiff's and defendant's motion for summary judgment is DENIED in part as to the adequacy of the search for responsive FOIA records. Because the Court is unable to evaluate the adequacy of the search due to the insufficiency of the defendants' affidavit, the Court further

ORDERS defendants to submit within 90 days additional and/or more detailed affidavits describing the processes and procedures followed by the USAO/DNJ when compiling the Jackson file, so that the Court may assess the adequacy of the search. If appropriate thereafter, the parties may renew their motions for summary judgment.

SO ORDERED.

/s/_____
RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

THE FREEDOM OF INFORMATION ACT
5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> (D) substantive rules of general applicability

adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall

be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated

information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4) (A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the

Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or

activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has

determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning

the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court other wise directs for good cause is shown.

(D) Repealed by Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine

whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the

person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of

subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence

in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate

regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the

term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to

interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such

record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c) (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

> (A) the investigation or proceeding involves a possible violation of criminal law; and
>
> (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's

status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer

telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall

also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and

categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.